SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

Respondent adopts, for the purpose of this memorandum, the material in the Petitioner's petition under the headings "Citations to Opinions Below," with reference to this case being reported at 379 F. 2d 897; "Jurisdiction" and "Statement of the Case."

Question Presented

Whether Respondent, a Vice-President of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, had "standing" to object to the use of various Union books and records against him in a criminal prosecution, which were admit-

tedly illegally seized from the Union's office by State officials over Respondent's protest?

Reasons for Denying the Writ

1. The decision below is not a significant departure from prior decisions of this Court.

The issue facing this Court concerns the *right* of a union official to object to the introduction of illegally seized union books and records in a criminal prosecution against the union officer. Admittedly, these same books and records belonged to Local 266 and were seized on the premises of Local 266.

When discussing the problem of standing, it is important to distinguish the right to raise the Fifth Amendment by a corporate or union officer in response to a lawful subpoena and the right to claim the Fourth Amendment where an illegal search and seizure has occurred. In fact, there has never been any claim of a Fifth Amendment right or privilege with respect to the production of the union records. *United States ex rel. DeForte v. Mancusi,* 261 F. Supp. at 580. The Court of Appeals, therefore, in this case, recognized the thorny area of "standing" under the Fourth Amendment (379 F. 2d at 899), and predicated its decision upon *Jones v. United States,* 362 U. S. 257, which attempted to articulate rules of guidance in the difficult area of standing (379 F. 2d at 900).

In *Jones,* the defendant was charged with possession of narcotics, a possessory crime which alone was sufficient convict. Jones sought suppression of certain evidence under Rule 41 (e)[1] of the Federal Rules of Criminal Pro-

[1] *Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure* may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained. * * *"

cedure. The Government contended Jones did not allege ownership of the seized articles or an interest greater than an invitee or a guest in the apartment which was searched. This Court held that Jones had standing to object to search and seizure because:

> 1. Where possession both convicts and confers standing, a defendant need not make a preliminary showing of an interest in the premises searched or the property seized and
>
> 2. Defendant's presence in the apartment with the permission of the person whose apartment it was, made out a sufficient interest in the premises to constitute him a 'person aggrieved' by the search (362 U. S. at 262).

While admittedly *Jones* has been extended by the Court of Appeals to cover an area of standing not considered in *Jones*, the decision is not a departure from prior decisions of the Supreme Court. Even so, the extension is rational and desirable. *Jones* evolved as a result of a possessory crime and the language of *Jones* is vital in determining what the case held and did not hold. Clearly, this Court decided that a defendant need not admit "ownership of narcotics" and need not own the premises where the search occurred. This Court's rationale began with citing Rule 41(e) of the Federal Rules of Criminal Procedure:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure', one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else" (362 U. S. at 262).

After discussing the "dilemma" of a defendant who was required to claim ownership or possession of narcotics in

order to gain standing, this Court stated that "the same element, *i.e.*, possession which convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized" (362 U. S. at 262). This Court went further and stated:

> "Even were this not a prosecution turning on illicit possession the legally requisite interest in the premises was here satisfied, for it need not be as extensive as a property interest as was required by the courts below * * *. No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him" (362 U. S. at pages 262-266).

The Court of Appeals thus applied the *Jones* rationale to allow Respondent standing. The Court also concluded that *Jones* informs us what is not required to confer standing but did not formulate rules for determining what is required. (379 F. 2d at 902.) Applying *Jones* to the facts, the Court of Appeals concluded:

> 1. Respondent was the victim of the search and seizure as it was directed against him, and
>
> 2. Respondent's privacy was invaded by the illegal search and seizure of books and records belonging to Local 266 as he was legitimately on the premises of Local 266 when the search and seizure occurred.

In essence, the Court of Appeals has obliterated in this case the requirement that a union officer must own the books and records which he seeks to suppress or the premises where the search and seizure occurred. It would be fruitless to explain the decision of the Court of Appeals

further as the opinion speaks for itself. Furthermore, and by way of background, Respondent's counsel filed with the Court of Appeals a forty-page brief which is available and may be of assistance to this Court. Prior decisions of this Court have not been rejected by the Court of Appeals and, if anything, the Fourth Amendment has been strengthened.

2. There is a conflict among the Circuit Courts of Appeals in the application of *Jones v. United States* relative to standing.

Respondent's counsel acknowledges that the Courts of Appeals have disagreed on the interpretation and application of *Jones* where corporate books and records have been seized and subsequently introduced in a criminal prosecution against a corporate officer. Counsel for the Respondent also concedes that the decision of the Court of Appeals for the Second Circuit completely overrules previous decisions established in that Circuit, *i.e. United States v. Guterma*, 272 F. 2d 344; *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631, cert. denied 329 U. S. 742; *United States v. DeVasto*, 52 F. 2d 26, cert. denied 284 U. S. 678.

First Circuit: The main case of *Cooper's Express, Inc. v. I. C. C.*, 330 F. 2d 338, and supporting cases, cited by petitioner, do not deal directly with an unlawful search and seizure but rather an inspection by government officials of corporate premises, included books and records.

Third Circuit: This Circuit has limited *Jones v. United States* to possessory crimes in *United States v. Grosso*, 358 F. 2d 154; certiorari granted, 338 U. S. 810, and refused to allow a corporate officer standing to object to the seizure of books and records belonging to a corporation; *United States v. Goldberg*, 330 F. 2d 30, which relied on *United States v. Guterma*, 272 F. 2d 344 (2nd Cir.) and *Lagow v. United States*, 159 F. 2d 245 (2nd Cir.).

Fourth Circuit: None of the corporate records were unlawfully seized in *United States v. Hopps,* 331 F. 2d 332; cert. denied, 379 U. S. 820 and, therefore, the Fourth Amendment did not require suppression of corporate records by an officer-defendant. There was recognition of the problem of standing and the conflicts in existence prior to the case at bar in the Second and Fifth Circuits (331 F. 2d at 340-341).

Fifth Circuit: Henzel v. United States, 296 F. 2d 650, applied *Jones* in the suppression under the Fourth Amendment of corporate books and records in a criminal prosecution against the corporation's president. This doctrine was subsequently approved in *Peel v. United States,* 316 F. 2d 907.

Ninth Circuit: The most recent pronouncement in this Circuit involving a corporate officer's standing to suppress an alleged unlawful search and seizure is *Hill v. United States,* 374 F. 2d 871, cert. denied, ____ U. S. ____, 36 U. S. L. Week 3144 (October 10, 1967, No. 318). This Court denied standing and the application of *Jones,* since the books and records belonged to the corporation; the defendant did not have an interest in the premises searched and no possessory crime, relying on prior decisions in the Second Circuit.

Tenth Circuit: In *Villano v. United States,* 310 F. 2d 680, the Court did not accept or reject the language of *Henzel v. United States* but applied *Jones* where an employee was seeking to have a notebook of his employer suppressed, which was taken from a common desk.

Petitioner has advised this Court that there is "a variety and inconsistency of approaches and results by the various Courts of Appeals". Page 14 of petitioner's brief. Coun-

sel for the Respondent has no alternative but to admit to the truth of this statement. The decision of the Court of Appeals however, is rationally correct and this Court should deny the petition for certiorari even if there is a conflict.

3. The Court of Appeals correctly applied the rule of standing in a *Habeas Corpus* proceeding.

In *Linkletter v. Walker,* 381 U. S. 618, this Court ruled that the exclusionary rule of *Mapp v. Ohio,* 367 U. S. 643, applied to state court convictions which had not become final[2] before its rendition. Respondent's appeal was not finally adjudicated until October 14, 1963, by denial for writ of certiorari to this Court. Respondent therefore, was entitled to the exclusionary rule.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Dated: Buffalo, New York, December 27, 1967.

Respectfully submitted,

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Attorney for Respondent.

SAPERSTON, WILTSE, DUKE, DAY & WILSON,
of counsel.

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[2] "By final, we mean where the judgment of conviction was rendered, the availability of appeal was exhausted and the time for petition for certiorari had elapsed before our decision in *Mapp.*" 381 U. S. 622, Footnote 5.